(5)

NO. 85-559

in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

PAUL H. COPLIN and
PATRICIA COPLIN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' BRIEF

Submitted by:
ANDREW C. BARNARD
9769 South Dixie Highway, Suite 201
Miami, Florida 33156
(305) 665-0000
Counsel of Record for Petitioners

and

DAVID J. KIYONAGA
136 E. Bay Street, Suite 304
Jacksonville, Florida 32202
(904) 354-4042
Co-Counsel for Petitioners

Of Counsel:
Beverly B. Parker, Miami, Florida
George S. Barnard, Miami, Florida
Michael C. Pierce, Balboa, Panama

60 pp

QUESTIONS PRESENTED

1. Whether the following language of Article XV(2) of the Implementation Agreement to Article III of the Panama Canal Treaty of 1977 is clear and definite in granting a bi-national tax exemption to U.S. citizen employees of the Panama Canal Commission?

> "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission."

2. Whether the appellate court can rely on an *extra-record* diplomatic note of questionable reliability to reverse a well reasoned forty-six page trial court opinion which found that the above language clearly granted a bi-national income tax exemption to U.S. citizen employees of the Panama Canal Commission?

3. After informing the trial court that Panama's interpretation of the above language was of 'little value' and of 'little relevance' and after refusing to provide the trial court with evidence of Panama's interpretation, can the United States government (a party litigant with a substantial financial interest in the outcome of the litigation) subsequently submit *extra record* materials of questionable reliability at the appellate level purporting to demonstrate Panama's interpretation of the above language?

4. Was it improper for the appellate court to take judicial notice of those *extra record* materials filed by the United States just one day before oral argument without notice and without giving the taxpayer an opportunity to rebut those *extra record* materials?

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The opinion of the United States Court of Appeals for the Federal Circuit as reported in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985), *rev'g*, 6 Cl.Ct. 115 (1984), appears in the Petitioners' Appendix filed in a separately bound volume at pages 1a-8a. The opinion of the United States Claims Court as reported in *Coplin v. United States*, 6 Cl.Ct. 115 (1984), also appears in the Petitioners' Appendix (hereinafter "Pet.App.") at pages 9a-69a. In light of the conflict nature of the Writ of Certiorari granted in this case, the opinion of the United States Court of Appeals for the Eleventh Circuit as reported in *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) is also reproduced in Petitioners' Appendix at pages 72a-86a. Other Petitioners whose cases in the Federal Circuit were consolidated on appeal with the *Coplin* cases have joined in the preparation and submission of the Petitioners' Appendix, specifically, *O'Connor v. United States*, No. 85-558, and *Mattox v. United States*, No. 85-560.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 10, 1985. A timely filed petition for rehearing was denied on July 3, 1985, whereupon a petition for certiorari was filed on September 30, 1985, which was granted on January 13, 1986. An enlargement of time within which to file opening briefs was granted up to and including March 22, 1986. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS AND STATUTES INVOLVED

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10029, Article III, Par. 9 (Hereinafter "Treaty"):

> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10030, Article XV, Par. 2 (Hereinafter "Implementation Agreement"):

> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

U.S. CONST. amend. V (Due Process Clause):

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

F.R.A.P. Rules 10(a) and 30(a), 28 U.S.C.A.

Rule 10(a):

> * * * The original papers and exhibits filed in the district court * * * shall constitute the record on appeal in all cases.

Rule 30(a):

> * * * The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record * * *

Fed. Rules Evid., Rule 201(b) and 201(e), 28 U.S.C.A.

Rule 201(b) and (e):

(b) Kinds of Facts

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(e) Opportunity to be Heard

> A party is entitled upon timely request to an opportunity to be heard as to the propriety

of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

STATEMENT OF THE CASE

A. Introduction:

Paul Coplin is a U.S. citizen employee of the Panama Canal Commission, and has been since October 1, 1979. He and his dependent wife paid their income tax on all of his wages earned during 1979 which included wages earned by him from his job with the Panama Canal Commission (hereinafter "Commission").

The Panama Canal Treaty of 1977 became effective on October 1, 1979. Article III, paragraph 9, of the Treaty refers to an implementing agreement that, pursuant to the Treaty,[1] governs the rights of employees of the Panama Canal Commission. This case concerns the proper interpretation of Paragraph 2 of Article XV of the Agreement in Implementation to Article III of the Panama Canal Treaty of 1977. It reads:

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[1]Article XV(2) above is incorporated by reference into the body of the Panama Canal Treaty of 1977 by the following:

> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10029, Article III, Par. 9 (Hereinafter "Treaty").

> 2. United States citizen employees and dependents shall be exempt from *any taxes*, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. (Emphasis added).

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. _____, T.I.A.S. No. 10030, Article XV, Par. 2 (Hereinafter "Implementation Agreement").

The Coplins, and many other Commission employees, claim that the language of Article XV speaks for itself and grants an unequivocal exemption from United States income tax. The United States Claims Court agreed with them. It granted the taxpayers' motion for summary judgment. The Claims Court said, in a 46 page opinion that exhaustively delved into the record, that the Coplins' 1979 Commission wages were exempt from U.S. income taxation based on the clear and unambiguous language of Article XV. *Coplin v. United States*, 6 Cl.Ct. 115, (1984), (Pet. App. 9a-69a).[2]

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[2]For reference purposes, Petitioners' Appendix filed concurrently with the Petitions for Certiorari is designated as "Pet.App."; references to the United States' appendices attached to its brief in response to the Petitions for Certiorari are designated as "Res.App. A, B, or C"; references to the joint two volume appendix filed in this case from the Federal Circuit are designated as "App.". References to transcripts of proceedings in the Claims Court are designated by a "T." and are further identified by date.

The Government appealed. The Federal Circuit, in an almost cavalier fashion, summarily reversed the Claims Court decision in a four page opinion. It ignored the clear language and based its opinion on suspicious "evidence" which was not part of the record on appeal. *Coplin v. U.S.*, 761 F.2d 688 (Fed. Cir. 1985). This "evidence" was suspiciously acquired from a new Panamanian administration on the heels of an unprecedented 30 million dollar gift given that administration by the United States.

In a recent case, *Harris v. United States*, 768 F.2d 1240 (11th Cir., 1985) *aff'ming* 585 F.Supp 862 (S.D.Ga. 1984), the circuit court rejected the very same "evidence" that the Federal Circuit accepted, concluding:

> "The government has failed to produce competent evidence that Panama and the United States 'intended to agree on something different from that appearing on the face of' Article XV of the Agreement. * * * (Citations omitted) * * * The government must live with the language it drafted. AFFIRMED."

Because of this conflict in the circuits, the Coplins petitioned the Supreme Court for a writ of certiorari to the Federal Circuit.

B. The Negotiations And Taxation As An Issue:

1. *The Issue: Taxation As A Symbol of Sovereignty.*

The issue of taxation as it related to the broader issue of sovereignty played a more significant role in the treaty negotiations than the government would have the Claims Court and the Federal Circuit Court of

Appeals believe. The Claims Court noted the complexity of the taxation issue as it related to sovereignty in the transcripts of the negotiations and pointed it out in its opinion:

> **"The record presented—sketchy though it be—paints a far more complex picture of what happened at the negotiating table than defendant's argument would suggest. It is clear that the United States and Panama held widely divergent views on the subject of taxation of Commission employees." *Coplin*, 6 Cl.Ct. at 129 (Pet. App., 29a).**

* * * *

"Defendant appears to overlook the fundamental issue in these negotiations when it argues that Article XV was not intended to shield Commission employees from U.S. taxation because that possibility was not expressly raised during the negotiating sessions for which we have a record. Equally naive is its assertion that Panama could have no interest in whether the U.S. taxes its citizens who live and work on Panamanian soil and operate the canal in which it has such a significant interest. Defendant's error lies in characterizing the negotiations as turning exclusively on fiscal issues, whereas the record indicates that the controversy was primarily a political one." 6 Cl.Ct. at 132, (Pet. App., 36a-37a).

* * * *

The dispute centered largely on a fundamental disagreement as to the nature and status of the Panama Canal Commission." *Coplin*, 6 Cl.Ct. at 129 (Pet. App., 29a).

* * * *

Panama perceived the operations of the Panama Canal Commission as a commercial enterprise. Panama analogized the operation to a government controlled monopoly: somewhat like the Swedish owned company of Volvo (App., 146). It reasoned that a commercial enterprise should be subject to the sovereign taxing jurisdiction where it carried out its operations. *Id.* at 129-130, (Pet. App., 30a-32a).

Panama viewed the power to tax as a symbol of sovereignty which the United States was well aware of. The July 8, 1977, U.S. internal position paper states:

> "Panama may be raising this as an issue to assert its 'sovereign right' to tax persons resident within its jurisdiction. The money involved is not important to the [Government of Panama], but the principle is." (App., 130).

2. *The Dilemma: Getting a Treaty Signed and Ratified.*

The U.S. negotiating team was caught in a dilemma. The deadline for winding up the treaty negotiations was rapidly approaching and ". . . there was growing pressure to bring the process to a successful conclusion. *See, e.g.*, N.Y. Times, Aug. 2, 1977, at A1, col. 5; Wash. Post, July 30, 1977, at A2, col. 3; N.Y. Times, July 30,

1977, at A1, col. 3." 6 Cl.Ct. at 134, (Pet.App., at 39a), yet thorny problems still existed in obtaining Panama's agreement.

Of these remaining problems, the taxation issue was still unresolved. Panama wanted to erase all vestiges of past American sovereignty in the Canal Zone but the State Department knew that treaty opponents in the Senate would kill the treaty if the United States agreed to allow Panama the right to tax the U.S. citizen employees of the Commission. A staff memorandum from the Treasury Department dated June 29, 1977, reads in pertinent part:

> "To rebate to the Government of Panama Federal income tax payments by U.S. taxpayers residing in the Canal Zone would raise an objectionable precedent in the use of tax policy and has practical problems as well. (App., 159) * * * * *(4) There is a history of strong Congressional opposition to foregoing U.S. tax for the benefit of a foreign country. Investment incentives in tax treaties have been consistently rejected. Congress has also resisted treaty provisions authorizing reciprocal assistance in collecting taxes." (App., 160).

As of July 21, 1977, the dilemma still existed, "This would be the type of issue which treaty opponents could use to considerable advantage. — — We believe we should oppose meeting Panama's demands on this question." Correspondence from Ambassadors Linowitz and Bunker to the Secretary of State (App., 162). *See also*, the August, 1977, State Department telegram showing this issue being still unresolved, App., 99.

Alternatively, the State Department knew that Panama might not sign the treaty if too many restrictions were placed on Panama's regaining sovereignty over the territory and the persons who worked there. An excerpt from the July 14, 1977, negotiating session highlights the controversy:

> **[Mr. Rodrigo] Gonzales [of Panama]:** . . . [I]f the National Bank of Panama, an agency of the government, established a branch in the US, its Panamanian employees would be liable to pay American income tax. The same thing applies to foreign workers in Panama. . . . Another example is Volvo, a government-owned company, which has set up assembly plants in the US. Both its American and Swedish workers pay US income tax.
>
> **[Ambassador Ellsworth] Bunker [of the United States]:** US government employees do not pay income tax anywhere in the world.
>
> **[Minister Aristides] Royo [of Panama]:** We must recognize the changing situation, that this Zone will no longer be a place where American workers are subjected to US jurisdiction, laws, police and courts. The situation now will be one in which American workers, although employed by the American government, will be subjected to a foreign jurisdiction, police, as the colonial status will cease to exist.
> *Coplin*, 6 Cl.Ct. at 130, (Pet.App. at 32a, App. at 146-147).

The use of the term "colonial status" illustrates that the Panamanians were becoming emotionally charged

on the subject of sovereign rights. Negotiating views became more divergent as the positions became deadlocked. As can be seen, the State Department had a tough problem on its hands. The first problem was getting Panama to agree. The other problem was to get the Senate to approve it.

3. *The Solution: Have Your Cake and Eat It Too.*

It is clear that at first, the U.S. negotiating team expected little problem in obtaining its objectives on the taxation issue. A declassified portion of a U.S. internally prepared outline dated May 3, 1977, illustrates this and states:

* * * *

Exemptions from Panamanian taxation

—The US employees need exemption from the following types of Panamanian taxation:

—all taxes, fees or other charges on income received as a result of their work for the United States in Panama. Similarly, as is provided by Panamanian law, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside Panama.

* * * *

—Panama should agree to provide these exemptions:

—in recognition that:

—this procedure is commonly accepted by all host countries in which US Government employees are working;

—to do otherwise would subject these employees to double taxation; and

—taxing these people in the ways mentioned would, in effect, be taxing the US Government, in derogation of our sovereignty. (App., 102)

* * * *

On June 26, 1977, the United States had prepared a draft of the (App., 74) Article XV language. This June 26, 1977, draft contained words in the second sentence which were words of limitation. It reads:

* * * *

United States citizen civilian employees, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of the work for the Canal Administration. Similarly, *as is provided by Panamanian law* they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. . . " (Emphasis added).

The June 26, 1977, draft (or any other draft for that matter) was not presented to the Panamanian delegation at any of the negotiating sessions. Instead

of proposing draft language to the Panamanian delegation which the U.S. team knew would be objectionable at the June 30, 1977, session, Ambassador Linowitz informed the Panamanians that the thought of no Panamanian tax exemption was being "strongly resisted" by the U.S., (App., 115). However, he further stated, "But in fairness to you, we think we ought to probe it further." *Id.*

At the July 11, 1977, session Panama's insistence on taxing the U.S. citizen employees of the Commission did not abate (App., 119-127). It seemed that the more the negotiators talked about the problem, the wider their differences grew. The Claims Court noted:

* * * *

"As the negotiations progressed, the positions of the parties hardened and their differences grew wider rather than narrower. As Ambassador Linowitz noted at the July 11, 1977, negotiating session, '. . . these problems have been even intensified in our further discussions. . .' " 6 Cl.Ct. at 131, (Pet.App., 34a)

* * * *

The July 12, 1977, negotiating session (App. 134-141) became more animated rather than conciliatory and no headway was made. The July 14, 1977, (App. 142-147) session became so animated that the parties were frozen in their positions and literally nothing was said about the income tax at the next meeting on July 18, 1977, (App. 156-158). The parties were deadlocked and the negotiations were at a standstill. It is here that the

transcripts of the negotiations abruptly cease. The only evidence that exists as to what happened next comes from the affidavit of Dr. Carlos Lopez-Guevara, Panama's Ambassador Extraordinary and Plenipotentiary for Canal Treaty Negotiations. He was physically present when the Article XV language was first presented to the Panamanian delegation. He says:

> "5.—During the last negotiation session held in Panama, in August of 1977, the U.S. Delegation *proposed* the text of what is now Section XV, Paragraph 2 of the Agreement in Implementation of the Panama Canal Treaty of 1977, which reads thus: * * * This text was tabled without explanation and no objection was raised by the Panamanian Delegation. Therefore, it was agreed." (Emphasis added).

* * * *

> "7. * * * The wording of the above transcribed agreement is crystal clear. It compels both Panama and the United States of America not to tax United States citizens by reason of their work with the Panama Canal Commission." * * * (App., ppgs. 192-193).

The text that Dr. Guevara refers to above did not have the words "as is provided by Panamanian law," to limit its application as distinguished from the previous draft, *supra*. At those sessions where transcripts were prepared, it is clear that Panama was never shown any of the four "rough drafts" prepared by the Department of State. (App., 26, #2, Defendant's response to Plaintiff's interrogatory #2). Dr. Guevara's affidavit affirmatively

shows that the Article XV language was only presented to the Panamanian delegation at the final negotiating session in August of 1977. It is clear from other portions of the record that the Panamanian position had not changed. They still wanted to tax the U.S. citizen employees. (App., 99; App., 103-105—speech outline dated 8/7/77).

Chief Judge Kozinski concluded that the State Department submitted the language as a compromise. Neither country would tax the U.S. citizens. This was a realistic political compromise that the United States felt compelled to enter into because of the time constraints on the Treaty.

Panama signed the Treaty and Agreements on September 7, 1977. Within two weeks of the signing, a Treasury Department memo from Marcia Field went to a Mr. Goodman recommending that the language of Article XV be clarified to limit the exemption to Panamanian taxation only. (App. 59). Trapped by its own language, the State Department was forced to consider other alternatives than seeking clarification from Panama.

The Panamanian Plebiscite approved the Agreements in October of 1977, and the Agreements were submitted to the Senate Foreign Relations Committee for its recommendations. On October 25, 1977, in a recently disclosed memorandum obtained from the Treasury Department through a Freedom of Information Act request (attached as an appendix at pg. A1),[3] the State Department was put on notice that

[3]Taxpayers request the Court to take judicial notice of this October 25, 1977, memorandum in as much as the Government should have produced it pursuant to a March 23, 1982, request for production.

it would need more than mere legislative history to override the clear language of Article XV if the implementing agreement had the status of a treaty. That letter from Charles I. Kingson to Arthur J. Schissel states in pertinent part:

* * * *

> "1. Paragraph 2 of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty ("Agreement") dealing with the taxation of United States citizens is unclear. This causes little problem as long as the legislative history clearly reflects that this provision refers only to an exemption from Panamanian taxes and the Agreement is an executive agreement which does not change existing United States tax law. However, if this Agreement is subject to the advice and consent of the Senate, we do not know whether it will have the status of a treaty, which probably overrides existing tax law. *If so, more than legislative history may be necessary to assure that the tax exemption in Article XV applies only to Panamanian taxes.*" (Emphasis added).

* * * *

During this same time frame, Mr. Hansell of the State Department and Attorney General Bell were both testifying to the Senate Foreign Relations Committee that the implementing agreement was an integral part of the treaty and would derive its authority from both the Constitution and the Treaty. *See Panama Canal Treaties, Hearings before the Committee on Foreign*

Relations, United States Senate, Executive N, 95th Cong., (1st Sess.) Part I, pg. 235. *See similarly*, letter from Senator Baker to the State Department, *id.*, at pg. 328 and responses from the Justice Department, *id.*, at pg. 331 and the State Department, *id.*, at pg. 334. (See fn. 1, *supra.* on pg. 4)

As a first step, the State Department prepared the "Section by Section Analyses" of the Agreement that it has relied upon so heavily in the past, as part of the legislative history. However, Senator Stone of the Senate Foreign Relations Committee did not find that to be sufficient. He suggested that the matter be clarified formally with the Republic of Panama by means of an 'understanding' appended to the instruments of ratification. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., Pt. 1, at 268-269 (1977), (Res. App. C, ppgs. 10a-12a). *Compare, Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) (a discussion of the colloquy between the State Department and the Senate appears on Pet.App., ppgs. 82a-84a).

The State Department rejected Senator Stone's suggestion. Instead, the State Department promised to find 'a way to avoid' the lawsuits predicted by Senator Stone. The fact that no clarification resulted speaks for itself.

The absence of any evidence to the contrary shows that Panama did not know that the U.S. Department of State was attempting to unilaterally subvert the clear meaning of Article XV. The facts indicate a deliberate attempt to mislead the Senate because the language was prepared months before it was first proposed to the Panamanian delegation, and even then, tabled without

any explanation. The lack of other competent evidence infers that Panama would not have receded from its negotiating position but for the clear language. (T., 2/23/84, 9-10).

Finally, the U.S. Senate gave its advice and consent to the Treaty and the exemption language without any reservation or understanding relevant thereto, and the instruments of ratification were duly exchanged in June of 1978. Thus, both the United States and the Republic of Panama were agreed upon the language if not the meaning of the Treaty and its Agreement. The Coplins and many others rely on the language and its meaning.

The Government suggests that this case is no different from other cases which have decided the same arguments. This case is different because the Court's attention is directed to a reliable source of contemporaneous Panamanian intent evidenced by the negotiating transcripts and the circumstances leading to the signatories' approval of the tax exemption language.

The Claims Court summed up the situation succinctly at the March 8th, 1984, hearing when it said:

> "* * * I feel strongly that the United States did a bad thing here, that it was, at the very least, insensitive and negligent and perhaps more, perhaps more. I don't know what went on. I am puzzled by the opaqueness of the answers given to some of the questions during the ratification process by the fact that there are no notes, nothing about what went on in those Panama meetings, and by the fact that whenever a suggestion is made that a

> clarification be obtained, that it is sh[r]ugged off. * * *" (T. 3/8/84, 54).

C. The Proceedings Below:

1. *Satisfaction of the Jurisdictional Prerequisites:*

After 1979, the Coplins filed their tax return and then filed a timely claim for refund on a form 1040X for $3,759.00 (I-A, 38-39) pertaining to Mr. Coplin's wages from the Panama Canal Commission for the last quarter of 1979. The basis of the refund claim was that the wages earned from the Commission by a U.S. citizen are tax exempt under Article XV(2) of the Implementing Agreement to Article III of the Panama Canal Treaty of 1977.

In conjunction with this, the Coplins claimed that their exemption was authorized by statute, to wit: 26 U.S.C. Sec. 894:

> Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle. 26 U.S.C. Sec. 894(a)

On November 26, 1980, the Internal Revenue Service denied the administrative claim for refund (App., pg. 40). The Coplins timely filed a lawsuit for a refund in the Court of Claims in August of 1981. (App., 9-12). The Court of Claims became the United States Claims Court under the Federal Courts Improvement Act of 1982, Pub.L. 97-164, Apr. 2, 1982, 96 Stat. 25. The Claims Court had jurisdiction to hear the case under 28 U.S.C.

Sec. 1346(a). Such refund suits are authorized under 26 U.S.C. Sec. 7422(f)

2. *Proceedings in the Claims Court:*

The Claims Court held three hearings on cross motions for Summary Judgment, two of which occurred from the Court's desire to have clarification from Panama on what it considered an alarming discrepancy between the interpretation argued by the Government as opposed to what the Implementing Agreement says and what the evidence showed.

During the first hearing (February 23, 1984), after argument on the evidence by counsel, the Court advised the Government that its interpretation was not only unpersuasive (T. 2/23/84, 13-14, 36), but that the evidence and context presented, at the very least, two possible scenarios: either the State Department had done an incredibly poor job of drafting the treaty, or it was misrepresenting Panama's interpretation of the exemption language to the United States Senate. (T. 2/23/84, 20-22, 35-36, 66). The Court focused on the discrepancy between the evidence and the clear treaty language versus the Government's arguments, the State Department's unwillingness to clarify and resolve a recognized problem (T. 2/23/84, 54-59) and the strained interpretation the State Department placed on this otherwise clear language (T. 2/23/84, 22-25, 35-36, 54-59). The Court noted that the Senate, in 1977, had pointed out the need for a clarification from Panama on the tax exemption language. Although the Department of State assured the Senate Foreign Relations Committee that the problem would be resolved, it did nothing. (T. 2/23/84, 18, 54-59). The Court expressed deep concern about the Government's

lack of sensitivity to language which lures individuals into lawsuits against the United States (T. 2/23/84, 19-23, 35, 58-59). The Claims Court carefully scrutinized the colloquy between Senator Stone and the State Department representative, Herbert Hansell, which occurred during the Senate Foreign Relations Committee Hearings in late 1977. The Claims Court tried on numerous occasions to find out what steps the State Department had taken to "avoid" lawsuits such as this, since the promise had been made that a way to avoid this type of lawsuit would be found (T. 2/23/84, 59). Before ruling, in order to insure that the Government had ample opportunity to formally clarify this language, the Court suggested that the Government obtain a clarification from Panama through the State Department which might cast more meaningful weight on the Government's case. (T. 2/23/84, 34-35, 52-59). The Court also requested the Government to get in touch with someone from the State Department to explain the State Department's strange behavior in failing to formally clarify the language by means of an understanding or an alternative method since 1977. (T. 2/23/84, 59, 65-67, 70, 72). The Government indicated that two weeks would be sufficient for it to comply (T. 2/23/84, 72) knowing that failure to do so would be weighed against the Government's case (T. 2/23/84, 35-36, 66).

Two weeks later, on March 8, 1984, in the morning session, the Government represented that it did not believe a clarifying note could be obtained from the State Department regarding the Treaty language or an explanation of the State Department's failure to act (T. 3/8/84, 3). The Government indicated that it did not believe that such evidence was necessary or appropriate and that the United States wanted to rest on the record

(T. 3/8/84, 6, 8, 11-12). The Court, obviously alarmed at what it was hearing (T. 3/8/84, 3-13), reemphasized how important it would be for the Government to take advantage of this opportunity when it came time for the Claims Court to make its decision. (T. 3/8/84, 6-14). The Court suggested to the Government's counsel to bring a superior from the Department of Justice and someone from the State Department (T. 3/8/84, 14) to again insure, before ruling, that the Government was not merely rejecting this opportunity to set the record straight by oversight. Judge Kozinski wanted to make sure that the waiver of this opportunity was consciously made (T. 3/8/84, 9). The Court reiterated the seriousness of the matter and the peril confronting the Government's case (T. 3/8/84, 8, 14-15).

That afternoon the Government's counsel returned with her immediate superior, but with no one from the State Department (T. 3/8/84, 17). At that hearing, the Court reiterated its suggestion to make sure that the Government's opportunity was well understood (T. 3/8/84, 21) and the reasons therefor to the Government's counsel's superior (T. 3/8/84, 18-26) and again gave the Government an opportunity to supplement the record. The Government knowingly waived this and other opportunities to supplement the record (T. 3/8/84, 27-54) and requested that judgment be entered on the record as it stood (T. 3/8/84, 43). Having no alternative but to rule on the record presented, after asking again for more evidence from the Government and the opportunity again being waived (T. 3/8/84, 44), the Court informed the Government that such a failure to bring forth information would also be considered during deliberation (T. 3/8/84, 45). The Court reasoned thus because the Taxpayers had produced significantly more persuasive evidence and

arguments than the Government (T. 3/8/84, 45), when the Government was actually in a better position to acquire more evidence. The record was closed (T. 3/8/84, 50) and the Court entered judgment for Taxpayers from the bench.

In June the Court ordered all discovery to be supplemented and appended to the record without objection. The Court also supplemented the record with a letter from the Panama Canal Commission without objection. After almost five months from the March 8th hearing, the Court filed its 46 page opinion and judgment in favor of the Taxpayers. *Coplin v. United States*, 6 Cl.Ct. 115 (1984).

3. *The Proceedings in the Federal Circuit:*

The Government timely appealed the decision and filed its opening Appellate brief on November 30, 1984. The Federal Circuit had jurisdiction under 28 U.S.C. Sec. 1295(a)(3).

In its brief, the Government reiterated its belief expressed in the Claims Court that "the Panamanian interpretation would be of little relevance," and that "consulting the Panamanian Government in this case would have been of little value." (See Br. for Appellant, Fed. Cir., 11/30/84, ppgs. 46 and fn. 23 on pg. 47). The basis of its argument on appeal was that only its unilateral interpretation of treaty language was controlling, regardless of the clear language.

In October, 1984, a new administration came into power in Panama. On December 24, 1984, the United States gave the Republic of Panama 30 million dollars

which the United States Ambassador characterized as "unprecedented" in either country's history. (See Appellees joint Motion to Strike, Fed. Cir., 3/4/85).

In February, 1985, the government, who previously insisted that such evidence was of "little value", suddenly received a telegram from the Minister of Foreign Affairs of Panama with letters from three former Panamanian treaty negotiators who were not involved in any negotiations of Article XV(2) of the Implementation Agreement (as discussed *supra.*, at pg. 14-15, there were no negotiations held on the language of Article XV). The translated version of the letters and the accompanying telegram from the then Panamanian Minister of Foreign Affairs purport to indicate that now, the Republic of Panama does not think the treaty means what it says either. Actually, the letters are vague and ambigious and state only that the focus of the negotiations was on Panama's taxing power over the U.S. citizen employees of the Commission. They do not provide a direct interpretation.

On March 1, 1985, just one working day before the appellate oral argument, the government filed its reply brief and attached the cablegrams with translations to it as an 'appendix'. No previous notice was given to Appellees and no other pleading requesting the Court of Appeals to accept such papers was filed by the Government. Additionally, no explanation of how the cablegram was acquired was given to the court by the government.

On March 4, 1985, Taxpayers filed a joint motion to strike the proffered appendix informing the court of the 30 million dollar transaction with the new administration, and prior statements made by the Foreign

Minister during public discussions which were in direct conflict with the substance of the telegrams. The motions also noted the incompetence of the three individuals who had no direct involvement in the negotiation of the provision, and the due process problems that such a submission creates. The only explanation offered by the government for abandoning its prior position was that diplomacy could not be artificially limited by the time frames of litigation. The government misrepresented that it previously did not have sufficient opportunity to acquire the note and submit it during the trial proceedings in the Claims Court. It ignored the repeated waivers it made when the Claims Court requested more information. However, it conceded that the case could be decided solely on the record made in the Claims Court without reference to the suspiciously acquired cablegram. (Appellant's Reply Br., Fed. Cir., pg. 7). It similarly conceded the same thing in a related case then pending before the Eleventh Circuit. *Harris v. United States*, 768 F.2d 1240, *affirming* 585 F.Supp. 862.

The Court of Appeals denied the motions to strike and reversed the Claims Court on May 10, 1985. Taxpayers and two other appellees filed timely Petitions for Rehearing relying on the record made in the Claims Court and the due process problems raised by the government's actions. The three Petitions for Rehearing were denied on July 3, 1985.

4. *Proceedings in the Supreme Court:*

The taxpayers filed a Petition for Writ of Certiorari to the Federal Circuit in the Supreme Court on September 30, 1985, which was granted on January 13, 1986. This brief is due March 22, 1986.

SUMMARY OF THE ARGUMENT

This case is unusual because its focus is not only on the state of mind of the signatories of Article XV in 1977 but also on the positions of the negotiators at that time. The signatories' state of mind is shown by contemporaneous evidence preserved in the form of negotiating transcripts, actions taken at the negotiating table and the lack of adequate explanations for actions which should have been taken, but were not. Of course the best evidence of the signatories' intent is the clear language itself.

In the Statement Of The Case, the negotiating history that is preserved was analyzed from the perspective that a deadlock in the negotiations existed. However, even the most preserved history cannot record every thought and every nuance. These 'gaps' must necessarily be filled by inferences evidenced by the signatories' public actions in the course of concluding the treaty.

In this case, the United States and Panamanian negotiations were at a standstill. Panama perceived it as an issue of sovereignty. The United States was seeking a new Panama Canal Treaty. Out of the deadlock resulted language which, on its face, unambiguously exempts U.S. citizen employees of the Commission from both U.S. taxation and Panamanian taxation. This language was drafted and significantly amended several times by the United States before it was ever proposed to Panama. When it was proposed to Panama at the final negotiating session, the United States offered no explanation for it and Panama accepted it without objection.

Although the United States was informed by its own tax advisors that this language needed to be clarified in a restrictive sense on at least two different occasions, the Government did nothing. Before the Senate Foreign Relations Committee, formal clarification was again suggested. Instead of welcoming the chance to clarify the language pursuant to its own policy, the Government rejected all opportunities.

Even after litigation arose, and the opportunity presented itself time and time again, the Government still rejected all opportunities to formally clarify the language. Only after losing an important case in the Claims Court does the Government mysteriously acquire a cablegram from its Treaty partner, which was obtained under the most unusual of circumstances. A large gift of money was exchanged shortly before the cablegram arrived. The Government then submited it into two different Appellate courts instead of a trial court. As explanation for such an untimely action, the Government explained that no opportunity was given in the trial court for such a submission. This was false.

The Federal Circuit accepted the cablegram but the Eleventh Circuit rejected it. The taxpayers submit that the Federal Circuit abused its discretion in judicially noticing such materials that are introduced under such unusual and suspicious circumstances. Such an abuse deprived the Taxpayers of a fair trial.

Taxpayers submit that the Government's actions in this scenario have not been straightforward with Panama, Congress, the courts or the affected taxpayers. Its actions deserve close scrutiny to avoid a violation of the treaty it wrote. In the words of J. Eugene Wright,

sitting by designation in the Eleventh Circuit: "We shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court * * * The government must live with the language it drafted." *Harris v. U.S.*, 768 F.2d 1240, (11th Cir.1985).

I. THE FEDERAL CIRCUIT ABUSED ITS DISCRETION BY RELYING ON SUSPECT EVIDENCE TO REVERSE A THOROUGHLY CONSIDERED JUDGMENT AND BY JUDICIALLY REWRITING THE TREATY PROVISION WITHOUT REFERENCE TO SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO OVERTURN THE CLAIMS COURT.

A. Introduction.

> "A treaty is a contract between or among sovereign nations. See *Washington v. Fishing Vessel Assn.*, 433 U.S. 658, 675, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979). General rules of construction apply to international agreements. See *Ware v. Hylton*, 3 Dall. 199, 240-241, 1 L.Ed. 568 (1796) (opinion of Chase, J.). As with any written document, there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion * * * *" *The Five Per Cent. Discount Cases*, 243 U.S. 97, 106, 37 S.Ct. 346, 347, 61 L.Ed. 617 (1917). International agreements, like "other contracts, * * * are to be read in the light of

> the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting," *Rocca v. Thompson*, 223 U.S. 317, 331-332, 32 S.Ct. 207, 210-211, 56 L.Ed. 453 (1912)' see also *Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S.Ct. 191, 196, 78 L.Ed. 315 (1933), and should be interpreted according to the "received acceptation of the terms in which they are expressed." *United States v. D'Auterive*, 51 U.S. (10 How.) 609, 623, 13 L.Ed. 560 (1850)."

as quoted from Trans World Airlines, Inc. v. Franklin Mint Corp., ____ U.S. ____, 104 S.Ct. 1776, 1788 (dis.op. Stevens J.) (1984).

The Claims Court made a careful and exhaustive review of the record and ruled according to how it perceived the intent of the parties to be in 1977. It said:

> "Indeed, a fair reading of the language in question leads to the conclusion that it unambiguously exempts U.S. citizens who are Commission employees from taxation by Panama as well as the United States. *Accord Harris v. United States*, [585 F.Supp. 862]; *Swearingen*, F.Supp. at 1020." *Coplin*, 6 Cl.Ct. at 127 * * *
>
> " * * * A fair review of the negotiating history of Article XV leads to the conclusion that in all likelihood the language adopted accurately reflects the agreement reached by the parties." *Id.* at 134.

In sharp contrast to this, the Federal Circuit merely decided that the intent of the signatories to the treaty was better evidenced by a suspect diplomatic note obtained in 1985 rather than the negotiating documents created contemporaneously with the treaty in 1977. A concurring opinion made a token reference to the record, but contented itself in its decision by simply reforming the treaty provision. Both conclusions are in error for the reasons discussed below.

B. The Federal Circuit Abused its Discretion In Taking Judicial Notice of Patently Unreliable *Extra Record* Materials. The Federal Circuit Denied Taxpayers a Fair Trial By Reversing the Claims Court Judgment.

In reaching its majority decision, the Federal Circuit took judicial notice of a diplomatic note that was of questionable reliability.

Fed. Rules Evid., Rule 201(b), 28 U.S.C. states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

1. *The Reliability of the Diplomatic Note Is Questionable Because of the Way In Which It Was Obtained.*

Although the Federal Circuit ignored the Taxpayers' attempts to bring evidence to its attention which casts

doubt upon the credibility of the diplomatic note, the evidence still exists. The majority of the evidence is already part of the record in the Claims Court and consists of the negotiating history and the proceedings before the Senate Foreign Relations Committee. Additional evidence was submitted attached to the Taxpayers' motions to strike, dated March 4, 1985.

First, the copies of the cabled note and the three attachments are suspicious on their face. The three attachments allegedly signed by the Panamanian negotiators are identical in substantive wording (Res. App. 7a-9a): as if someone else prepared boilerplate letters for the Panamanians to sign. Significantly, no formal diplomatic note with signed authenticated letters has been filed in court. Petitioners have only seen copies of a cablegram. Additionally, the State Department gives no explanation as to how or what motivated their acquisition. The logical inference is that the instant litigation is responsible for the creation of these materials.

None of the three Panamanians who supposedly wrote these interpretative attachments, had anything whatsoever to do with the negotiation of Article XV. The transcripts of the negotiations and the affidavit of Dr. Carlos Lopez Guevara affirmatively show that the language of Article XV was never discussed. Additionally, the attachments do not show their alleged drafters being present when the language was first proposed at the negotiating table, or when the language was accepted by Panama. The attachments are not sworn.

Transcripts of statements made by Fernando Cardoze in 1984, while he was Panama's representative on the board of directors of the Panama Canal Commission,

are directly contradictory with the conclusions of his note. These transcripts were also introduced, but ignored by the Federal Circuit. See Appellees' Motions to Strike, March 4, 1985.

In addition to this, the circumstances surrounding the acquisition of the note casts considerable doubt upon its credibility. The note was created on the heels of a 30 million dollar gift to a new pro-American (The Miami Herald, Jan. 17, 1986, A16, Col. 1) Panamanian adminstration that had been in power for only two months. Even our own Ambassador in Panama labeled the gift 'unprecedented'. Although our government's political right to make such gifts cannot be challenged, their existence is certainly relevant as probative evidence going to the weight of the note's credibility. However, such evidence was also ignored by the Federal Circuit.

2. *The Negotiating History Further Erodes the Material's Reliability.*

The negotiating history illustrates the inconsistencies of the State Department's acts with its own established procedures. Specifically, the Government repeatedly failed to draft the Article XV language during the negotiations in a way that would support its present position. (Pet.App. 44a-47a). "Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332, 32 S.Ct. 207, 210, 56 L.Ed. 453 (1912). It is noted that the Government has failed to come up with any reasonable explanation for drafting Article XV in such sweepingly unambiguous terms.

Such clarity cannot be turned inside out by invoking rules of construction. *Bergholm v. Peoria Life Ins.*, 284 U.S. 489, 492, 52 S.Ct. 230, 231, 76 L.Ed. 416 (1932); *National Surety v. McGreevy*, 64 F.2d 899 (8th Cir. 1933). The language of the instrument cannot be ignored when construing it. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 181, 102 S.Ct. 2374, 2372, 72 L.Ed2 765 (1982); A.L.I., *Restatement of the Law, Foreign Relations Law of the United States*, Sec. 147(2).

The State Department refused to communicate its intent to restrictively interpret the language to the Panamanians both before, during and after the instrument was signed. It refused to communicate its restrictive interpretation evidenced by the "Section By Section Analyses", that were given to the Senate Foreign Relations Committee, by means of an 'understanding' even though the opportunity was presented by Senator Stone. *See Harris v. United States*, 768 F.2d at 1245-1246, (Pet.App. 82a-84a). This inconsistent approach towards informing a treaty partner of its intent to restrictively interpret a provision in a treaty is against State Department policy. *See e.g., Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir., *vacated as moot sub nom., American Public Power Association v. Power Authority of New York*, 355 U.S. 64, 78 S.Ct. 141, 2 L.Ed.2d 107 (1957). The policy of the State Department has consistently been:

> Even in the case of an "understanding" * * * it is the invariable rule in regard to bilateral treaties to obtain the consent of the other country before ratifying the treaty.

U.S. Department of State, *The Law of Treaties as Applied by The Government of the United States of America*, 102 (Mar.31, 1950), *quoted in* Bishop, 103 Receuil des Cours 304.

Such a failure to communicate an interpretation at the conclusion of the treaty process makes that interpretation ineffective. *Fourteen Diamond Rings v. United States*, 183 U.S.176, 179-180, 22 S.Ct. 59, 60-61, 46 L.Ed.138 (1901).

In light of such suspect behavior, it is unreasonable to allow the introduction of such materials in the Appellate proceeding. The actions of the Government violated the spirit of *"uberrima fides"*, that is, that treaties must be entered into with utmost scrupulous good faith. *Tucker v. Alexandroff*, 183 U.S. 424, 437, 22 S.Ct. 195, 200, 46 L.Ed. 264 (1902).

> "There is something * * * which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it."

New York Indians v. United States, 170 U.S. 1, 23, 18 S.Ct. 531, 536, 42 L.Ed. 927 (1897).

3. *In Light of the Questionable Reliability of the Diplomatic Note, The Federal Circuit Abused Its*

Discretion In Denying The Motions To Strike and The Petitions For Rehearing.

When a Court takes judicial notice of any item of evidence, it must give an opportunity to be heard under the rules. Fed. Rules Evid., Rule 201(e), 28 U.S.C. A failure to grant such an opportunity is reversible error, because the failure to give such an opportunity infers that the Federal Circuit considered the note in a vacuum. Facts judicially noticed may be subject to rebuttal. *Government of Virgin Islands v. Gereau*, 523 F2d 140 (3rd Cir. 1975) *cert.den.* 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323. *See also, Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 301, 57 S.Ct. 724, 729, 81 L.Ed 1093 (1937). "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." *Id.* The effect of taking judicial notice does not preclude the introduction of evidence in rebuttal. Such a preclusion is a denial of due process and is fundamentally unfair.

Rule 44.1 of the Claims Court Rules of Procedure and the identical rule 44.1 of the Fed.R.Civ.Pro., 28 U.S.C., both require reasonable notice from any party intending to raise an issue of foreign law, especially when an invitation to do so in the trial court had been expressly rejected. *See United States v. VETCO*, 691 F.2d 1281 (9th Cir. 1981). *Similarly, Jannenga v. Nationwide Life Insurance Co.*, 288 F.2d 169 (D.C. Cir. 1961).

In denying Taxpayer's motions to strike, and then taking judicial notice of the note, the Federal Circuit eviscerated the Taxpayers' right to a fair trial, Fed. Rules Evid.. 28 U.S.C., Rule 201. The Government

appealed the Claims Court judgment on the basis of insufficient evidence, and then, in a surprising move, introduced *extra record* materials that it had waived introducing at the trial level.

The logical inference is that the instant litigation motivated the acquisition of the diplomatic note. Although the Federal Circuit opted to ignore the competent evidence of intent created contemporaneously with the treaty in 1977, the Eleventh Circuit was not so diverted. *See Harris, supra.*

By denying the petitions for rehearing Taxpayers did not receive an opportunity to present evidence against the note. Some of the evidence that Taxpayers could have brought forth, had the opportunity been afforded, concerned the legality of the note under Panamanian law. Under Article 31 of the Vienna Convention, clear and unambiguous language controls the interpretation of a treaty provision. Interpretations or agreements that change the meaning of clear language must themselves be ratified formally in accord with Article 39 of the Vienna Convention. Article 4 of the Panamanian Constitution of 1972 obliges Panama to follow the Vienna Convention, even though the United States has not ratified it. *See, A.L.I., Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Sec. 325, comment f., Tentative Draft No. 6—Vol.2, Apr. 12, 1985, pg. 100.

As distinguished from American practice, the Vienna Convention mandates a review of secondary sources such as negotiating histories and Senate debates only if the meaning attributed to the plain language of the provision in question is unreasonable. *Id.*

4. *Additional Considerations.*

a. The Government Has Waived Its Rights to Introduce New Evidence of Any Kind.

It was the U.S. government who drafted the language of Article XV. This drafting process included participation by at least two Federal Departments, at least three State Department attorneys, two U.S. ambassadors and miscellaneous other U.S. negotiators. Additionally, the drafting took place over several months and at least four separate drafts have been produced. Each of the drafts contain amendments differentiating one from the other. The government could have amended it to clearly exempt only Panamanian taxes as was done elsewhere in the treaty. Instead, the government deleted language which made the provision even more broad and sweeping (compare the first draft with the last draft). Clearly, the government's characterization of the language being merely the result of a drafting error is false.

When the Senate was conducting hearings, there were at least three notices given to the State Department stressing the need to clarify the exemption language. These notices consist of: the Marcia Field memorandum (App., 58-59); the Treasury Department memorandum from Charles I. Kingson to Arthur J. Schissel reproduced in the appendix attached hereto (See fn. 3 *supra*); and the colloquy between Senator Stone and Herbert Hansell reproduced at Res. App. at ppgs. 10a-12a. A recent Freedom of Information Act request to the Treasury department produced the Kingson/Schissel memorandum. This memo shows that the government was aware that the language agreed upon would need more than

legislative history to keep the exemption from being reciprocal if construed as having the force and effect of a treaty. The State Department, as well as the Attorney General, knew that the Article XV language had the force and effect of the Treaty because they represented as much to the Senate. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, United States Senate, 95th Cong., (1st Sess.) Pt. 1, at 235, 328, 331, 334, (1977), and fn 1., *supra* at pg. 4.

Taxpayers suggest that it was this memo which motivated the Department of State to prepare the self-serving "Section By Section Analyses" relied upon so heavily by the government. Taxpayers suggest that those same analyses were prepared by the government as an expedient method to gain political support from the Senate for the ultimate ratification of the treaty.

Further evidence of chicanery is apparant in the legislative history. For example, the colloquy between Senator Stone and Herbert Hansell of the Department of State did not evidence the legislative history hoped for by the Department of State. Although Mr. Hansell filled the record with declarations that the taxation issue was merely internal, Senator Stone's persistent inquiry into the matter did not receive direct answers and his challenge, that the United States enter into a formal 'understanding' with Panama, was brushed aside. When Senator Stone warned of lawsuits being filed by "Zonians" to enforce their exemption, Mr. Hansell represented that the Government "would find a way to avoid" such problems. *See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. Pt. 1, at 268-269 (1977), Res. Br., App. C., ppgs. 10a-12a. *See also, Harris v. United States*, 768 F.2d at 1245-1246.

As it turned out, Mr. Hansell's promise was empty. Mr. Hansell did nothing to clarify this provision to prevent litigation. If Panama was in accord that the exemption language applied only to Panamanian taxation in 1977, the Department of State should have welcomed the vehicle of an 'understanding' to expressly clarify this language.

When the case was called up for summary judgment in February of 1984, the Claims Court again gave many opportunities to the government to get in touch with Panama and solicit its views. Instead of welcoming this reprieve, the government repeatedly refused the opportunities and insisted that the case be decided on the materials then before the court.

After appealing the case and characterizing Panama's interpretation as being of 'little relevance' and of 'little value', the Government deposited with the appellate court a diplomatic cablegram from Panama on the eve of oral argument. The court expressed curiosity as to this unusual late filing. The Government casually explained that the wheels of diplomacy grind slowly and that the Government did not have the opportunity to present such evidence in the Claims Court.

Such arrogance cloaked in a mantle of humility is shocking and can not be tolerated in a court of justice. The government is estopped from introducing any *extra record* material to controvert not only the clear language, but its own stated position as to the relevance of a Panamanian interpretation. To even entertain such knavery makes a mockery of our court system and our concepts of due process.

The judiciary acts as a buffer and bastion against the tides of government arrogance and its effect on individuals. To allow such conduct in the appellate court proceedings or the Supreme Court would simply supplant our system of law with an unbridled system of "might over right". This is a government of law, not men. *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1802). The Federal Circuit's analysis of this case actually condones misconduct by the government.

The government could have, but did not, restrict the application of Article XV(2) to Panamanian taxation only. It is estopped from doing so now through the courts.

For these reasons, Taxpayers submit that the Government has waived any right whatsoever to introduce new evidence of such a suspicious nature into the Appellate proceeding, and the Federal Circuit abused its discretion in accepting the evidence.

b. Judicial Estoppel and the Rules of Appellate Procedure Precluded the Government from Introducing the Note and Precluded the Federal Circuit From Accepting It.

Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery. *Konstantindis v. Chen*, 626 F.2d 933, 938 (1980). The doctrine is similar to an ordinary estoppel but differs in that its policy is to prevent a party " * * * from "playing 'fast and loose,'" *Scarano v. Central R. R.*, 203 F.2d 510, 513 (3d Cir. 1983), or "blow[ing] hot and cold," *Ronson Corp. v. Aktiengesellschaft*, 375 F.Supp. 628, 630 (S.D.N.Y. 1974) with the courts, and is

designed to "protect the integrity of the courts and the judicial process." *United Virginia Bank v. Saul Real Estate*, 641 F.2d 185, 190 (4th Cir. 1981), *quoting from Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1177-1179 (D.S.C.1975)." *Donovan v. United States Postal Service*, 530 F.Supp. 894, 902 (D.D.C.1981).

The criteria applicable for the application of judicial estoppel are: (1) the same facts must be in issue; (2) the judicial body must have relied upon the assertions of the party; (3) the assertions must not have been based on fraud, inadvertence, or mistake. *id.*, at 902. The net effect of the elements must result in an adverse outcome in the prior judicial proceeding, *Konstantinidis v. Chen, supra.* at 938-939.

In the instant case, all the criteria have been met by the Government: (1) Intent of the signatories of Article XV is the factual issue; (2) The Claims Court relied on the Government's representation that no interpretive declaration or note would be sought from Panama; (3) The Claims Court repeatedly verified that the Government knew it had the opportunity to present such evidence but said opportunities were "steadfastly refused". (4) The Claims Court relied upon the waiver in weighing the evidence and making its deliberations against the Government.

Now, in the Appellate stage of the proceedings, the Government takes unprecedented measures and secures a diplomatic note that it refused to even entertain at the trial level, and submits it as 'conclusive' evidence of intent even though its reliablity and legality is vigorously contested by the Taxpayers.

Taxpayers submit that the Government is precluded from introducing such evidence and the Federal Circuit abused its discretion in accepting such materials by the doctrine of Judicial estoppel. In addition, the Government has waived any right to submit such evidence in the appellate court when it knowingly refused the opportunity to do so at the trial level.

The Appellate Rules of Procedure specifically prohibit the Government from introducing into the Appellate proceedings *extra record* materials. F.R.A.P. Rules 10 and 30, 28 U.S.C. Although some exceptions have been judicially created, Taxpayers submit that the instant case is not such an exception.

Intent in a contract is a question of fact which needs to be proved by competent contemporaneous evidence. Judicial notice of the 1985 diplomatic note after its introduction was waived by the Government in the trial court is a highly unusual act which obviously had a critical effect on how the Court viewed the case. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. *Trans World Airlines, Inc. v. Hughes*, 308 F.Supp. 679 (S.D.N.Y. 1969), *modified on other grounds*, 449 F.2d 51, *reversed on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577, *reh.den*, 410 U.S. 975, 93 S.Ct. 1434, 35 L.Ed.2d 707, *on remand*, 359 F.Supp. 783.

C. The Court Abused Its Discretion by Judicially Rewriting The Treaty Provision.

The Federal Circuit, instead of examining the contemporaneous record of the negotiations and the exhaustive analysis prepared by the Claims Court, chose

to virtually ignore both, and blindly accepted the Government's argument. Instead of citing competent evidence from the record, the Federal Circuit chose to reform the title of Article XV thereby rewriting the essence of the tax exemption clause. A court may not rewrite the contract to achieve an end it deems desirable, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943), nor add or detract from its terms as this is the function of the political branch. The courts have no treaty making powers. *The Amiable Isabella*, 6 Wheat. 1, 71-73, 5 L.Ed. 191 (1821). Likewise, reversing the Claims Court by a cursory reference to the record without any citations thereto to show the alleged error of the Claims Court is an abuse of discretion.

In the final analysis, there is nothing in the Federal Circuit's opinion that justifies reversing the Claims Court's judgment. The Federal Circuit's decision should be reversed on the basis of abusing its discretion.

CONCLUSION

There is no precedent that justifies the blind acceptance of the suspect cablegram that surfaced at the eleventh hour. Likewise, there is no precedent allowing a court to judicially rewrite a treaty when there is substantial competent and contemporaneous evidence in the record to support its plain meaning. For the above reasons, the United States Federal Circuit Court of Appeals decision in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985) should be reversed and the decision of the United States Claims Court in *Coplin v. United States*, 6 Cl.Ct. 115 (1984) should be reinstated.

Respectfully Submitted,

Andrew C. Barnard
9769 South Dixie Highway,
Suite 201
Miami, Florida 33156
(305) 665-0000
Counsel of Record for Petitioners

and

David J. Kiyonaga
136 E. Bay Street, Suite 304
Jacksonville, Florida 32202
(904) 354-4042
Co-Counsel for Petitioners

By: _____
Andrew C. Barnard

Of Counsel:
Beverly B. Parker, Miami, Florida
George S. Barnard, Miami, Florida
Michael C. Pierce, Balboa, Panama

Appendix

Marcia Field
(handwritten)

Mr. Arthur J. Schissel
Chief, Legislation Section OCT 25 1977

Charles I. Kingson (Init.) C.I.K.
International Tax Counsel

Comments on State's draft bill regarding implementing legislation for the Panama Canal Treaty.

The draft legislation and related documents on the Panama Canal Treaty raise the following concerns:

1. Paragraph 2 of Article XV of the *Agreement in Implementation of Article III of the Panama Canal Treaty* ("Agreement") dealing with the taxation of United States citizens is unclear. This causes little problem as long as the legislative history clearly reflects that this provision refers only to an exemption from Panamanian taxes and the Agreement is an executive agreement which does not change existing United States tax law. However, if this Agreement is subject to the advice and consent of the Senate, we do not know whether it will have the status of a treaty, which probably overrides existing tax law. If so, more than legislative history may be necessary to assure that the tax exemption in Article XV applies only to Panamanian taxes.

2. Paragraph 3 of Article XV of the Agreement is also unclear. Does It exempt United States citizens from all Panamanian gift, inheritance and personal property taxes, or only insofar as those taxes apply

Marcia Field
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2. Paragraph 3 of Article XV of the Agreement is also unclear. Does It exempt United States citizens from all Panamanian gift, inheritance and personal property taxes, or only insofar as those taxes apply

to property located in Panama which is brought there solely because of the employee's work with the Commission. Arguably, Panama could impose a worldwide-based gift, inheritance, or personal property tax, from which only property located in Panama would be exempt. The appropriate interpretation of this paragraph should be made clear.

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3 Finally, a question arises whether the treaty and related documents, or the draft legislation, changes the tax status of the Canal Zone as a "possession" of the United States for purposes of sections 931 and 936 of the Internal Revenue Code. Those sections afford certain tax benefits to United States citizens and corporations with respect to income earned in a United States possession. Given Panamanian sovereignty over the Canal Zone, there is a question as to the appropriateness of continuing preferential possessions tax treatment. The possessions status of the Canal Zone under our tax law should be clarified one way or the other.